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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent, **A123840**

v. **(Solano County Super. Ct. No. FCR253784)**

KENNETH CHARLES TAYLOR,

Defendant and Appellant.

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Kenneth Charles Taylor appeals from a judgment entered after a jury convicted him of assault by means of force likely to produce great bodily injury, (Pen. Code, § 245, subd. (a)(1)[1]) assault with a deadly weapon, (§ 245, subd. (a)(1)) and false imprisonment (§ 236). He contends his conviction must be reversed because (1) the trial court erred when it denied his motion for new trial based on newly discovered evidence, (2) the court erred when it admitted certain evidence, (3) the prosecutor committed misconduct during final argument, and (4) the court erred when it denied his motion to strike one or more of his prior convictions. We reject these arguments and will affirm the conviction.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant was convicted of assaulting his sometime-companion, Lilly Kelly.

[1] Unless otherwise indicated, all further section references will be to the Penal Code.

Kelly is a correctional officer at Solano State Prison. She lived in an apartment in Suisun with a roommate, and occasionally, with appellant.

On April 5, 2007, appellant planned to help someone move. Kelly dropped him off at the person's residence. Kelly stopped by the residence after work, but appellant was not done. She returned home. Appellant finally called around 11:00 p.m. asking for a ride. Kelly was already in bed, but she agreed to pick appellant up.

When Kelly arrived, she found appellant bleeding "from head to toe." He was delirious and he screamed that "they" hurt him. Appellant also addressed Kelly by someone else's name. As Kelly drove to her apartment, appellant continued to scream and he hit her in the arm. When they arrived, Kelly left the car and ran to her apartment. Appellant followed continuing to call Kelly by a different name. Kelly entered her apartment and tried to sit down, but appellant grabbed a beer bottle and hit her on the head. Kelly ran out of the apartment screaming for help. She went to another apartment where Richard Darden lived.

Darden answered his door and saw appellant beating Kelly. Darden refused to open his door fully because his daughter was inside, but he did call 911. Appellant was strangling Kelly and telling her, "Get up bitch." Darden also worked at the prison and he had a gun. He pointed it at appellant, and ordered him to let Kelly go. Appellant replied, "[d]on't shoot." At that point the police arrived.

Appellant fled into Kelly's apartment. Kelly ran to one of the officers and pleaded for help. She pointed to her apartment and yelled, "arrest that man." The officers extracted appellant from the apartment and arrested him.

Based on these facts, an information was filed charging appellant with assault by means of force likely to produce great bodily injury, assault with a deadly weapon, and false imprisonment. As is relevant here, the information also alleged appellant had two prior strikes within the meaning of the three strikes law. (§§ 667, subds. (b)-(i), 1170.12.)

The case proceeded to trial where a jury convicted appellant on all three counts and found the prior strike allegations to be true.

Subsequently, the court sentenced appellant to a term of 25 years to life in prison.

II. DISCUSSION

A. New Trial

Appellant was convicted on June 11, 2008. Four months later on October 3, 2008, appellant filed a motion for new trial based on newly discovered evidence. The motion was supported by a declaration from Samuel Scott who was one of the people appellant helped move on April 5, 2007. Scott said he had purchased several bottles of alcohol for those who were helping him, and that his girlfriend's brother "Roy" had spiked a bottle of Jim Beam with eight or nine Vicodin pills. Scott said that someone named Deon became "very upset" when he learned what Roy had done and that Deon "hit Roy in the head with a lamp." Appellant then held a towel against Roy's head in an attempt to stop the bleeding. Scott said that "[o]thers were upset" when they learned that Roy had spiked the liquor. Scott also said appellant had been drinking Jim Beam.

Defense counsel also provided a declaration. She said appellant did not know he had been drinking alcohol spiked with Vicodin until he learned that fact from Scott who also was in jail.

The prosecutor opposed the motion for new trial. He argued Scott was not a credible witness because he came forward with his story more than a year after the incident. The prosecutor also argued the names of the individuals who were involved in the move would have been readily available to the defense.

At the hearing on the motion, the trial court expressed concern about appellant's diligence in raising the issue. The court noted that appellant's new evidence showed Deon hit Roy in the head after he learned Roy had spiked the whiskey and that appellant then held a towel to Roy's head. Given that appellant was "right in the middle of" the incident, the court said it was "implausible" to believe that appellant would not have known what the situation was all about. Noting that appellant had not raised the issue in the 14 months between the incident and the trial, the court denied the motion for new trial.

Appellant now contends the trial court erred when it denied his motion for new trial.

As is relevant here, section 1181, states that a criminal defendant may move for a new trial, "When new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial." A trial court ruling on a motion for new trial should consider five factors: """1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits."'" (*People v. Delgado* (1993) 5 Cal.4th 312, 328, citations omitted.)

The trial court is granted broad discretion to decide whether it is appropriate to grant a new trial and its ruling will be reversed on appeal only where the court abused its discretion. (*People v. Delgado*, *supra*, 5 Cal.4th at p. 328.)

We find no abuse here. Appellant's motion was premised on allegedly new evidence that he unknowingly drank whiskey spiked with Vicodin on the day in question while helping someone move. However, appellant's evidence also indicated those helping in the move learned about the alleged spiking that same day and that one of them hit the alleged perpetrator in the head with a lamp. Appellant then assisted the injured party by holding a towel to his head. As the trial court noted, given that appellant was "in the middle of" the spiking incident, it was implausible to conclude that appellant could not, with reasonable diligence have learned about it in the 14-month period between the incident and the trial. The court's ruling on this point was reasonable and it certainly did not constitute an abuse of discretion.

B. Admission of Evidence

As we have stated, the information alleged appellant had suffered two prior strikes within the meaning of the three strikes law. The prosecutor elected to prove those allegations with testimony from Jane Murphy, a fingerprint specialist who works for the Solano County Sheriff's Office. Murphy said she compared fingerprints contained in two

Evidence Code section 969b packets[2] from the Department of Corrections concerning appellant's prior convictions (exhibits 12 & 13) with fingerprints on appellant's current booking card (exhibit 14). Murphy said the fingerprints on all three documents were from the same person.

The prosecutor then asked that exhibits 12, 13, and 14 be admitted into evidence. Defense counsel objected "on a lack of foundation." The trial court responded as follows:

"Your objection is noted. These documents, it appears to the Court, that with respect to Exhibits 12 and 13, they are certified exhibits from the Department of Corrections. It further appears to the Court that Mr. Kenneth Taylor's photograph, with respect to Exhibit 13, is very clear in that exhibit.

"In addition, we have the witness's testimony that the fingerprints contained in that exhibit are the same as the fingerprints taken from his arrest information, April 6th of last year, relating to this case.

"The photograph in the earlier matter, 1984, is less certain. It does appear it's Mr. Taylor, but he has a much more youthful appearance, let's put it that way, and again, the record does reflect these are certified copies of the documents received from the Department of Corrections.

"The [witness] testified that the fingerprint cards in this exhibit also match the fingerprint card from Mr. Taylor's arrest in this matter. So these documents will be received as Court exhibits."

Appellant now raises two issues with respect to exhibit 14, the booking card. First, he argues the trial court should not have admitted exhibit 14 into evidence because it did not qualify as a "business record" under Evidence Code section 1271.[3]

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[2] Evidence Code section 969b allows certified copies of state prison records to be used for the truth of the matter asserted in those records. (See *People v. Martinez* (2000) 22 Cal.4th 106, 116.)

[3] Evidence Code section 1271 states: "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to

We need not address this issue directly because appellant failed to object on that ground in the court below. Having failed to raise an Evidence Code section 1271 in the trial court, appellant has forfeited the right to raise it on appeal. (Evid. Code, § 353.)

Appellant argues there was no forfeiture because the foundational objection he asserted in the trial court "encompassed" his Evidence Code section 1271 hearsay objection. We disagree. "Where, as here, the proffered evidence is allegedly imperfect because of the lack of preliminary proof, which might or might not have been supplied by the party offering such evidence, the objection must be specific and it must point out the alleged defect. If this is not done, the objection cannot be urged on appeal." (*People v. Tolmachoff* (1943) 58 Cal.App.2d 815, 826.) Indeed, many cases have held that an objection based on lack of foundation is insufficient and that the objecting party must point out specifically in what respect the foundation is lacking. (See, e.g., *People v. Moore* (1970) 13 Cal.App.3d 424, 434, fn. 8; *People v. Modell* (1956) 143 Cal.App.2d 724, 729-730.)

Alternately, appellant argues the trial court violated his Sixth Amendment right to confront the witnesses against him when it admitted exhibit 14 into evidence. Again, we conclude appellant has forfeited the right to raise this issue on appeal. While appellant did object on Sixth Amendment grounds in the court below, he objected to the court rather than the jury deciding whether the prior conviction documents were authentic. As counsel stated, "I believe that the jury needs to make a finding for anything that increas[es] the defendant's sentence, which these priors do, and I think by having the Court make this finding, it violates the defendant's right to a trial by jury, which is guaranteed by the Sixth and Fourteenth Amendments."

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prove the act, condition, or event if: [¶] (a) The writing was made in the regular course of a business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

Having failed to assert an objection based on Sixth Amendment confrontation grounds in the court below, appellant has forfeited the right to raise that issue on appeal. (Evid. Code, § 353; see also *Melendez-Diaz v. Massachusetts* (2009) 174 L.Ed.2d 314, 323, fn. 3.)

C. Prosecutorial Misconduct

Count 1 charged that appellant assaulted Kelly with force likely to produce great bodily injury. As is relevant here, the trial court instructed the jurors on that offense using the standard instruction, CALCRIM 875, as follows:

"The defendant is charged in Count 1 with assault with force likely to produce great bodily injury in violation of Penal Code section 245.

"To prove that the defendant is guilty of this crime, the People must prove that:

"1. The defendant did an act that by its nature would directly and probably result in the application of force to a person *and the force used was likely to produce great bodily injury*;

"2. The defendant did that act willfully;

"3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone; and

"4. When the defendant acted, he had the present ability to apply force likely to product great bodily injury." (Italics added.)

The prosecutor, as is common, used the instruction when framing her argument to the jurors. At five points during her presentation, the prosecutor told the jurors that to convict appellant on count 1 they must find that appellant used force which could cause great bodily injury. However, the prosecutor did not always articulate the second aspect of the first element set forth above: i.e., that the force used was *likely to cause great bodily injury*. Appellant now contends his conviction on count 1 must be reversed because the prosecutor committed misconduct by repeatedly misstating the law during final argument.

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury. Furthermore, and particularly pertinent here, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*People v. Morales* (2001) 25 Cal.4th 34, 44.) Measured by this standard, we conclude the prosecutor's comments were not misconduct.

While it is true the prosecutor did not always articulate both aspects of the first element set forth in the CALCRIM instruction, there was no unfairness or deception here. The very first comment about which appellant complains occurred while the prosecutor *was reading from a display of the instruction at issue*. Any possible confusion that may have arisen from the prosecutor's abbreviated argument would certainly have been clarified by the jurors simply reading what was before them. Furthermore, when defense counsel objected to the prosecutor's argument in the court below, the prosecutor clarified her remarks:

"I'll read right from the instruction, so that no one thinks that I'm misstating the law. It says, 'Or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.'

"And as I said, this bottle was used in a way that could cause great bodily injury and it did cause great bodily injury. [Kelly] had staples in her head."

Viewing the record and the prosecutor's argument as a whole, we conclude it is not reasonably likely the jurors construed or applied any of the prosecutor's remarks in an objectionable fashion. (*People v. Morales, supra,* 25 Cal.4th at p. 44.) We find no error.

D. Motion to Strike

Prior to sentencing, appellant filed a motion under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, asking the court to strike one or more on the prior

conviction findings. Appellant noted that on the date of the offense, he had been out of work due to an injury. He also noted that there had been no prior instances of domestic violence between himself and Kelly.

The prosecutor opposed the motion noting appellant had a lengthy history of serious criminal offenses including robbery, (§ 211) receiving stolen property, (§ 496) and robbery while armed with a weapon (§§ 211, 12022, subd. (b)). The prosecutor also noted that appellant's most recent performance on parole had been very poor. Appellant violated his parole no less than seven times. Based on that record, the prosecutor urged the court to deny appellant's request.

The trial court conducted a hearing on appellant's motion where Kelly and her roommate testified. Both described appellant as a good man who did not deserve to go to prison.

After hearing this evidence and the arguments presented, the court set forth its initial conclusions as follows:

"Well, there are a couple of things that are clear to the Court. First of all, Mr. Taylor does have a lengthy and relatively unrelenting record of recidivism. He actually has more than just the two robbery convictions that were alleged here. These offenses have been committed in numerous jurisdictions, over 20 plus years, and as a result of that, Mr. Taylor has spent a substantial portion of the last two decades in custody.

"Mr. Taylor has also, since he was last sentenced on this, and I take it, it was charged as a one strike, the robbery that he got the 16 years on. I am just guessing, with the 16 years they charged the first robbery, the robbery a strike.

"But since he was first released on parole in that matter in 2002, it appears that he was returned to the Department of Corrections for parole violations numerous times. This is almost the definition of a recidivist in his actions, which I don't think a year went by that he wasn't returned at least once for some new violation of his parole.

"Some of these violations appear to this Court to have been quite serious. And what also is very disturbing to the Court, is that less than a year from the time when he was ultimately returned and completed his sentence – I think the last time he was

returned was 2006, and within a year of that, or maybe the same year, he was back in custody on these new charges."

Despite these serious concerns, the court wanted to research the matter more fully. It took appellant's case under submission.

At the continued hearing, the court denied appellant's motion explaining its decision as follows:

". . . I just do not feel that after reviewing all of Mr. Taylor's history, in addition to the strikes that were alleged and proved in this case. Mr. Taylor has a third uncharged or unalleged strike that was not alleged. He has since 1982, a period of 25 years, committed many, many offenses, including violent and serious offenses, bringing him within the purview of the three-strikes provisions.

"He received a 16 year term in 1994, and after being paroled in 2002, violated that parole, I believe seven separate times. This offense was committed within a month of parole having been terminated, for an offense which he committed in 2005, and I just don't feel under the circumstances that I have any choice in this matter. I just don't feel that there's any justification for not following the three-strikes law in this case, and accordingly, I will follow the three-strikes law. The *Romero* motion will be denied."

Appellant now contends the trial court erred when it denied his motion to strike one or more of the prior strike findings.

In *Romero*, our Supreme Court ruled that trial courts have the discretion under section 1385 to strike a prior conviction in furtherance of justice. (*Romero*, *supra*, 13 Cal.4th at p. 531.) In *People v. Williams* (1998) 17 Cal.4th 148, the court articulated the factors trial courts should evaluate when exercising discretion under section 1385: "[T]he court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Williams*, *supra*, at p. 161.) The trial court is granted the discretion to decide whether to

strike a prior conviction and its ruling may be reversed on appeal only where the court abused its discretion. (*People v. Garcia* (1999) 20 Cal.4th 490, 503.)

We find no abuse here. Appellant's current offense was extremely serious. He beat his companion with a beer bottle causing her serious injuries. The brutal nature of the current offense fully supported the court's ruling.

As for appellant's background and prospects, as the trial court noted, appellant had a criminal history in excess of a quarter century long, which included several serious crimes. Appellant's inability to conform to the norms of society is demonstrated by the fact that he violated his most recent parole no less than seven times and by the fact that he committed the current offense only one month after his period of parole was completed. The trial court reviewing this evidence reasonably could conclude that appellant was not outside the scheme of the three strikes law's spirit, in whole or in part. We conclude the court did not abuse its discretion when it declined appellant's motion to strike.

Appellant contends the trial court erred because it did not resolve some minor factual disputes that arose in the context of his motion. As we have noted, the evidence showed appellant violated his parole seven times, and the prosecutor alleged one of those violations was based on a felony violation of inflicting corporal injury on a spouse or cohabitant (§ 273.5). Defense counsel stated she did not think that was the basis for that violation. In addition, the prosecutor alleged appellant's other parole violations were for offenses such as being intoxicated drunk in public (§ 647, subd. (f)) and giving false information to a police officer (§ 148.9). Appellant, by contrast, characterized the parole violations as being related to his substance abuse. Appellant argues the trial court erred because it did not conduct a hearing to resolve those conflicts. We find no place in the record where appellant asked the trial court to conduct a hearing to resolve the conflicts he has identified. Appellant has forfeited the right to raise the issue on appeal. (*People v. Hoyos* (2007) 41 Cal.4th 872, 892.) Even ignoring the procedural barrier, the argument is unpersuasive. While the nature of the offense that triggered a parole violation might be important in some instances, that is not the case here. What was important here was the sheer number of violations. The mere fact that appellant violated his parole seven times

was more than sufficient to show that appellant was unable to conform to the rules of society.

Appellant also suggests the court misunderstood the scope of its authority because it said it did not believe it had "any choice in the matter." However, appellant has taken the court's statement out of context. The court said it did not have any choice in the matter given the "circumstances" of appellant's case, i.e., a career criminal who had committed yet another violent criminal offense and who had plainly demonstrated that he came within the scope of the three strikes law. Read in context, the court's comment does not demonstrate it misunderstood the scope of its discretion.

Finally, appellant argues that at a minimum, the court should have struck the first strike; a 1982 robbery conviction. The court should have done so, appellant argues, because the robbery occurred many years ago; Kelly and her roommate both testified appellant was a good person who did not belong in prison; and Kelly said that appellant had never hurt her in the past and that he may not have understood what he was doing when he assaulted her. The factors appellant cites are relevant and it was appropriate for the court to take them into account. However, none of those factors, either alone or in combination compelled the conclusion that appellant's motion must be granted. We conclude the court did not abuse its discretion when it denied appellant's motion to strike.

III. DISPOSITION

The judgment is affirmed.

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Jones, P.J.

We concur:

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Simons, J.

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Bruiniers, J.